IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-9081

SHAPE SPA FOR HEALTH AND BEAUTY, INC., ET AL.,

Petitioners,

VS.

LINDA ROUSSEVE, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	9
Appendix—Decision of Court of Appeals	1A
Decision of Trial Court	10A

AUTHORITIES

Case	Page
Daniel v. Paul, (1969) 395 U.S. 298, 89 S.Ct. 1697, 23 L. Ed. 2d 318	4, 5, 6
Evans v. Seaman (5th Cir. 1972) 452 F. 2d 749	5
Miller v. Amusement Enterprises, Inc. (5th Cir. 1968) 394 F. 2d 342	5, 6
Pinkney v. Meloy, (N.D. Fla. 1965) 241 F. Supp. 943	8
Smith v. YMCA, (5th Cir. 1972) 462 F. 2d 634	5, 6
United States v. Johnson Lake, Inc., (S.D. Ala. 1970) 312 F. Supp. 1376	5
United States v. DeRosier, (5th Cir. 1973) 473 F. 2d 749	5

STATUTES

28 U.S.C. §1254(1)	2
42 U.S.C. §2000a	2
42 U.S.C. §2000a(a)	8
42 U.S.C. §2000-6(a)	3
42 U.S.C. §2000a(b)(1)	8
42 U.S.C. §2000a(b)(3)	3, 4, 7

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The petition of Shape Spa for Health and Beauty, Inc., et al., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on the 16th day of July, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 516 F.2d 64 (5th Cir. 1975) and is appended hereto at page 1A.

The opinion of the District Court for the Eastern District of Louisiana is unreported but is quoted in its entirety as a part of Judge Ainsworth's dissent to the decision appearing at 516 F. 2d 64, 69 and appears at page 10A hereof.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit is dated and was entered on July 16, 1975. A timely petition for rehearing *en banc* was denied on September 25, 1975, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

WHETHER A BUSINESS ORGANIZATION, THE PREDOMINANT PURPOSE OF WHICH IS NOT ENTERTAINMENT BUT THE PROMOTION OF THE PHYSICAL WELL-BEING OF ITS MEMBERS THROUGH PROGRAMS OF EXERCISE AND WEIGHT CONTROL, COMES WITHIN THE TERM "PLACE OF ENTERTAINMENT" WITHIN THE MEANING OF THE PUBLIC ACCOMMODATIONS PROVISIONS OF THE CIVIL RIGHTS ACT OF 1964 BECAUSE SOME ELEMENTS OF RELAXATION, DIVERSION AND PLEASURE MAY INCIDENTALLY BE DERIVED BY SOME INDIVIDUALS ENGAGED IN THE PROGRAMS.

STATUTE INVOLVED

The pertinent portions of Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a, are:

> (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segrebation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce . . . .
>
> * * *
>
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment. . . .

42 U.S.C. §2000a-6(a) provides:

> (a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subchapter and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

STATEMENT OF THE CASE

Plaintiffs have sued the defendant Shape Spa Studios claiming that the defendant health studios are "place[s] of entertainment" within the meaning of 42 U.S.C. §2000a(b)(3) and asserting the existence of jurisdiction under 42 U.S.C. §2000a-6(a). Defendants deny that they are "place[s] of entertainment" within the meaning of 42 U.S.C. §2000a(b)(3) and contend that such provision cannot serve as a basis for jurisdiction.

The district judge dismissed the complaint upon cross motions for summary judgment and held that, "[t]he generally accepted meaning of the Act's language—'place of exhibition or entertainment'—does not encompass the defendant clubs." Accordingly, judgment was entered in favor of the defendants, dismissing the complaint for lack of jurisdiction.

The Fifth Circuit Court of Appeals, Judge Ainsworth dissenting, reversed the trial judge and held the defendant health studios to be "place[s] of entertainment" covered by §2000a(b)(3). In his dissenting opinion Judge Ainsworth stated that, "[t]he majority has simply failed to accord the term 'place of entertainment' its generally accepted meaning as employed in common parlance." Stating his disagreement with the "extreme interpretation by the majority of the term 'place of entertainment,'" Judge Ainsworth concluded that "the congressional purpose is frustrated for the public accommodations provisions of the Act were not designed to include all establishments" and he adopted the opinion of the trial judge as his own, attaching it as an appendix. Defendants now apply to this Court for a writ of certiorari and seek the reversal of the decision below.

REASONS FOR GRANTING THE WRIT

I. *The Decision Below Constitutes An Unprecedented Extension of the Term "Place of Entertainment" As Used in the Public Accommodations Provisions of the Civil Rights Act of 1964.*

The leading Supreme Court case, *Daniel* v. *Paul*, 395 U.S. 298, 89 S.Ct. 1697, 23 L.Ed. 2d 318 (1969), established that the term "place of entertainment" should be given effect according to its generally accepted meaning

and held that a 232-acre amusement area with swimming, boating, sunbathing picnicing, miniature golf, dancing facilities and a snack bar to be a "place of entertainment." All of the cases construing the term have involved establishments, such as that considered in *Daniel* v. *Paul*, which, by their very nature and then taken in their entirety provide frivolity, pleasure, amusement and diversion and rather clearly fit into the category of a 'place of exhibition or entertainment." Such establishments include a bar, *United States v. DeRosier*, 473 F. 2d 749 (5th Cir. 1973); an amusement park, *Miller* v. *Amusement Enterprises, Inc.*, 394 F. 2d 342 (5th Cir. 1968); a roller skating rink, *Evans* v. *Seaman*, 452 F. 2d 749 (5th Cir. 1972); a swimming and dancing complex, *United States* v. *Johnson Lake, Inc.*, 312 F. Supp. 1376 (S.D. Ala. 1970); the recreational facilities of youth camps and YMCA's, *Smith* v. *YMCA*, 462 F. 2d 634 (5th Cir. 1972); and others.

When considered in their very nature and viewed in their entirety, the defendant health studios cannot similarly be fitted into the category of "place of exhibition or entertainment". The joint stipulation entered into by the parties clearly establishes that the defendant studios do not exist as places of entertainment, whether by legal or a general definition of the word, and that the service provided is directed at the physical fitness, health and well-being of club members. It is stipulated that Shape Spa Studios do not provide or contain amusement games, cards, or entertainment devices such as jukeboxes and record players. They provide no restaurant or snack facilities whatsoever and provide no shows, performances or athletic competitions. To the contrary, as determined by the district Judge:

> The prime purpose of the clubs and its members is the very serious one of improving physical well-

> being and any resultant entertainment flowing use of the clubs' facilities and execution of their programs would be nominal and on an individual, and not public, basis. 516 F.2d at 72.

The majority of the appellate panel acknowledged this purpose as follows:

> Appellees argue that their purpose is to correct physical deficiences and promote physical well-being of their patrons; they maintain that they are not "places of entertainment." While we do not doubt that appellees have properly characterized one of the purposes of their health and exercise program, we are convinced that there are sufficient entertainment and recreational aspects of the programs offered to permit the studios to be termed "place[s] of entertainment." We concluded in United States v. DeRosier, 473 F.2d 749 (5th Cir. 1973), that §2000a(b)(3) does not require that the "entertainment be of a certain variety or that a certain quantum of the establishment's business be derived from the entertainment of customers." 473 F.2d at 752. Our determination that the health studios are "place[s] of entertainment" is not disturbed by the fact that also have the serious purpose of weight reduction and figure control. Such a dual purpose will not operate to remove them from the coverage of the Civil Rights Act. 516 F. 2d at 68.

In concluding that the defendants' establishments were "place[s] of entertainment" the majority of the appellate panel relied on the "amusement park cases," *Daniel v. Paul*, 395 U.S. 298, 89 S.Ct. 1697, 23 L. Ed. 318 (1969), and *Miller* v. *Amusement Enterprises, Inc.*, 394 F. 2d 342 (5th Cir. 1968). and on *Smith* v. *YMCA*, 462 F. 2d 634 (5th Cir. 1972), involving the recreational facilities of a YMCA. The reliance on these cases seems clearly inapposite

as they involve large recreational and amusement facilities clearly existing primarily for frivolity, pleasure, diversion and amusement. The majority's emphasis on language extracted from defendants' newspaper advertisements also seems inapposite as the ads do no more than stress that weight control may be achieved in a generally pleasurable and relaxing manner. All of the defendants' advertisements clearly reflect the purpose of membership, namely weight control, health and beauty. A person seeking amusement, frivolity, pleasure and diversion—i.e. entertainment—would hardly respond to the advertisements. Finally, the appellate court found support from the fact that the defendants had used the word "recreation" in an introductory statement in its training manual for its employees. The court considered the use of the word "recreation" to support the conclusion that the defendants provide "entertainment." It is submitted that "recreation" and "entertainment" are not synonymous. The word "recreation" as used by defendant is in accord with its generally accepted meaning, that is, restoration to health, creation anew, and refreshment.

One normally associates with "entertainment" as element of play, amusement, frivolity or diversion. If there is any element of entertainment in the services provided by the defendant health studios, it is highly subjective and is *de minimis* and should not serve as a basis for jurisdiction under Title II of the Civil Rights Act of 1964. As stated by Judge Ainsworth in his dissent:

> Though firmly in agreement that 42 U.S.C. §2000a(b)(3) must be liberally construed to accomplish the purposes of the Act, I nevertheless disagree with the extreme interpretation by the majority that the term "place of entertainment" includes the Shape Spa health studios. The ma-

> jority has simply failed to accord the term "place of entertainment" its generally accepted meaning as employed in common parlance. Thus the congressional purpose is frustrated for the public accommodations provisions of the Act were not designed to include all establishments. 516 F.2d at 68.

It is submitted that the appellate majority erred in failing to consider the quantum of entertainment, if any, involved in defendants activities.

II. *The Decision Below Significantly Frustrates The Congressional Purpose that the Public Accommodations Provisions of the Civil Rights Act of 1964 Were Not Designed to Include All Establishments.*

It is evident from the language of the statute that Title II does not prohibit discrimination in all places or even in all places of "public accommodation." It prohibits discrimination only in places of public accommodation as defined therein. 42 U.S.C. §2000a(a). Defendants establishments do not fit any of the specified categories of §2000a(b)(1)—(4) unless they are classified as places of entertainment. But to hold that the defendants' establishments are "place[s] of entertainment" would be to so classify any establishment where the activity engaged in might be classified as pleasurable by certain of its patrons. For example, one would almost certainly be required to include within the definition barber shops and beauty salons (which have heretofore been held to be covered only when located within the premises of a covered establishment. *E.g.*, *Pinkney* v. *Meloy*, 241 F.Supp. 943 (N.D. Fla. 1965)), libraries (including law libraries), churches, schools, restaurants, hotels and motels (for which special provision is already made in 42 U.S.C. §2000a(b)(1)) and, perhaps this Court itself. It is submitted that such a construction is clearly not that intended by Congress and frustrates the

clear congressional purpose that the Public Accommodations provisions were not designed to cover all establishments. It is submitted that this judicial intrusion on the congressional prerogative should be reversed.

CONCLUSION

The question presented has arisen by virtue of a decision which is an unprecedented extension of the reach of the Public Accommodations provisions of the Civil Rights Act of 1964, and which frustrates the congressional purpose that those provisions not cover all establishments. In view of these substantial issues it is submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that I have, on this 23rd day of December 1975 served three copies of the foregoing petition on all interested counsel by depositing the same in a United States post office with first class postage prepaid, addressed as follows:

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APPENDIX

Linda ROUSSEVE, on behalf of herself, et al., etc., Plaintiffs-Appellants,

v.

SHAPE SPA FOR HEALTH AND BEAUTY, INC., et al., Defendants-Appellees.

No. 74-1945.

United States Court of Appeals,
Fifth Circuit.

July 16, 1975.

Class action was brought under Civil Rights Act of 1964 against health spas alleging racial discrimination in the membership policies of the spas. The United States District of Louisiana, Edward J. Boyle, Sr., J., rendered summary judgment for the spas and plaintiffs appealed. The Court of Appeals, Gewin, Circuit Judge, held that women's health spas which offered general programs of curative or rehabilitative treatment, including diets, physical exercises, baths and sauna treatments and projected an advertising image of an elegant and relaxing weight loss program in pleasant surroundings was a "place of entertainment" in purview of public accommodations provisions of the Civil Rights Act of 1964.

Reversed and remanded.

Ainsworth, Circuit Judge, dissented and filed opinion.

1. *Commerce—16*

Where Louisiana health spa facilities were used by approximately 9,000 to 12,000 members per year, some of whom were members of similar health clubs in other states to whom spa made available their facilities on reciprocal basis, spa regularly advertised for members on television, in newspapers, via telephone solicitations, and generally through media which crossed state lines, and at least 90% of equipment used in health spas was manufactured outside of Louisiana and moved in commerce, operations of spas affected commerce in purview of Civil Rights Act of 1964. Civil Rights Act of 1964, §201(a), (b)(3), (c)(3), 42 U.S.C.A. /2000a(a), (b)(3), (c)(3).

2. *Civil Rights—4*

One of the purposes of public accommodations provisions of Civil Rights Act of 1964 was to eliminate unfairness, humiliation, and insult of racial discrimination in facilities which purport to serve the general public. Civil Rights Act of 1964, /201(b)(3), 42 U.S.C.A. /200a(b)(3).

3. *Civil Rights—6*

Women's health spas, which offered general programs of curative or rehabilitative treatment, including diets, physical exercises, baths and sauna treatments, and projected advertising image of offering elegant and relaxing weight loss program in pleasant surroundings, were "places of entertainment" in purview of public accommodations provisions of Civil Rights Act of 1964. Civil Rights Act of 1964, §201(b)(3), 42 U.S.C.A. §2000a(b)(3).

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEWIN, AINSWORTH and MORGAN, Circuit Judges.

GEWIN, Circuit Judge:

On this appeal the issue is whether a women's health and exercise club or studio is within the coverage of the public accommodations provisions of the Civil Rights Act of 1964. Specifically we must determine whether such an establishment is a "place of entertainment" within the meaning of Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a(b)(3), and therefore subject to its provisions. It is our conclusion that the health and exercise studios here involved are "place[s] of entertainment" within the intended coverage of the Act's public accommodations provisions.

Appellants brought a class action under the Civil Rights Act against four New Orleans area Shape Spa health clubs or studios alleging racial discrimination in the membership policies of the studios.[1] The parties filed cross motions for partial summary judgment on the issue of whether the studios were "place[s] of entertainment" within the meaning of the Act and submitted a joint stipulation of fact in connection with the motions. The district court found that the prime purpose of the health studios was "the very serious one of improving physical well-being and any resultant entertainment flowing from use of the clubs' facilities and execution of their program would be nominal and on an individual, and not public, basis." Concluding

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[1] The appellees who operate the health studios involved are four separate Louisiana corporations located in or near New Orleans. Appellant Rousseve alleges that she is a black female citizen who has applied for and been refused services by the appellees because of her race. Appellant Robbins alleges that she is a white female citizen who has applied for and been refused services by the appellees because of her association with and concern for black women.

that the generally accepted meaning of the phrase, "place of entertainment", did not encompass the defendant health studios, the district court granted appellees' motion for summary judgment and dismissed the action.[2] We do not agree with the conclusion of the district court and therefore we reverse its order granting appellees' motion for partial summary judgment.

[1] Title II of the Civil Rights Act of 1964 prohibits discrimination or segregation on the basis of race, color, religion, or national origin in places of public accommodations whose operations affect commerce. Sections 2000a(a), (b)(3), and (c)(3) of 42 U.S.C. provide:

> (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the

[2] The district court did make the following finding:

> We recognize that there are some elements of *fun, relaxation and entertainment* derived from many phases of man's daily activities and could well be experienced by some individuals in some of the exercise regimen and programs offered by the defendant clubs. On the other hand, we doubt that the rigors of the exercise and other activities in which overweight and unshapely female patrons of the clubs must participate to achieve their desired goals and the ultimate benefits offered by the clubs' programs can be regarded as *entertainment of a nature* which would cause the clubs to be brought within the Act's coverage. Surely, one who executes the exercises and performs the activities required by the program and upon completion of the course has achieved the maximum benefits possible for that individual may derive great personal satis- and joy, and, looking back, describe the experience as *fun*. But those who do not accomplish as much likely would experience disappointment and frustration and condemn the whole affair as an ordeal. (Emphasis added).

> meaning of this subchapter of its operations affect commerce . . . .
>
> • • •
>
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment . . . .
>
> (c) The operations of an establishment affect commerce within the meaning of this title if . . . (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions or other sources of entertainment which move in commerce . . .

The facilities operated by the appellees are used by approximtaely 9,000 to 12,000 members per year, some of whom are members of similar health clubs in other states to whom the appellees make available their facilities on a reciprocal basis. The appellees regularly advertise for members on television and in large daily newspapers, solicit memberships by telephone, and generally use media which cross state lines. At least 90% of the equipment used in the health clubs of the appellees was manufactured outside of the state of Louisiana and "moved" in commerce. In our opinion the record clearly supports the conclusion that the operations of the appellees affect commerce within the meaning of the above quoted statute.[3]

[3] Although the district court found that the activities of the appellees did not come within the terms of Title II of the Civil Rights Act of 1964, it did conclude that the facts disclosed by the record would support a finding that the activities of the appellees in the operation of the health clubs or studios in question did affect commerce. It felt such a finding was unnecessary in view of its conclusion that the appellees' establishments were not "place[s] of entertainment" under the Civil Rights Act of 1964. Appendix p. 53.

[2] One of the purposes of the public accommodations provisions of the Civil Rights Act of 1964 was to eliminate the unfairness, humiliation, and insult of racial discrimination in facilities which purport to serve the general public. H.R. Rep. No. 914, 88th Cong., 1st Sess., 18 U.S. Code Cong. & Admin.News 1964, p. 2355. This circuit, *en banc*, while acknowledging that the Act was not intended to cover all establishments, has committed itself to the view that §2000a(b)(3) must be read "with open minds attuned to the clear and strong purpose of the Act, namely, to secure for all citizens the full enjoyment of facilities described in the Act which are open to the general public." Miller v. Amusement Enterprises, Inc., 394 F.2d 342, 349 (5th Cir. 1968). In *Miller* this court concluded that an amusement park was a "place of entertainment," reasoning that the phrase included "both establishments which present shows, performances and exhibitions to a passive audience and those establishments which provide recreational or other activities for the amusement or enjoyment of its patrons." 394 F.2d at 350. The Supreme Court, in Daniel v. Paul, 395 U.S. 298, 89 S.Ct. 1697, 23 L.Ed.2d 318 (1969), endorsed the view of this circuit that the statutory language "place of entertainment" should be read to include recreational areas as well as places of spectator entertainment.[4]

[3] In Daniel v. Paul, the Supreme Court noted that "entertainment" is defined as "the act of diverting, amusing, or causing someone's time to pass agreeably: [synonymous with] amusement." 395 U.S. at 306 n.7, 89 S.Ct. at 1701, 23 L.Ed.2d at 318 n.7. It is clear to us that the

[4] In Daniel v. Paul, 395 U.S. 298, 89 S.Ct. 1697, 23 L.Ed.2d 318 (1969), the establishment in question was the Lake Nixon Club near Little Rock, Arkansas. The club was a 232-acre amusement area with swimming, boating, sun bathing, picnicking, miniature golf, dancing facilities, and a snack bar.

activities available at the health sudios fall within this definition of "entertainment." In view of the nature of the program offered by the health studios of appellees and considering the image that the studios have chosen to project through their advertisements, we feel that it is neither straining language nor expanding the definition of the word "entertainment" to hold that the health and exercise studios are covered by the phase "place of entertainment" as it is used in /2000a(b)(3).

We recognize that the health and exercise studios differ from the amusement park in *Miller* and the lake retreat in *Daniel* but, nevertheless, we feel that the term "place of entertainment" includes the health and exercise studios operated by appellees. It is stipulated that the health spas offer "general programs of curative or rehabilitative treatment, including diets, physical exercises, baths and sauna treatments." Studio facilities consist of various gymnasia equipment, thermal and whirlpool baths, inhalation rooms, solaria, and swimming pools; body massages and facial treatments are available.

As previously noted, new members are solocited through television and newspaper advertisements, through random telephone solicitations, and through offers of "complimentary visits" and "special introductory programs." In a newspaper advertisement which shows women relaxing in lounge chairs, the studios invite participation in their weight reduction program: "The most unusual part of the process is how little effort it takes to reduce. Snooze, read, play cards, or just relax while those unwanted inches melt away." Pleasure and relaxation are stressed as prequisites of membership in the studio programs: ". . . Have fun with our fabulous personalized exercise program. Swim and Luxuriate in the Whirlpool Baths. Invigorate. Ah!

Luxury! . . ." One advertisement urges: "Have fun with our introductory offer. . . ." Another offers "the poolside lounge area for carefree lazing . . ." A third advertisement entices: "Enter a Shape Spa, and you know immediately you're in a woman's world. Here there's no strenuous exercise, only relaxing slimnastics— . . . everything to make your visits to Shape Spa enjoyable. Everywhere there is the air of luxury and elegance so appealing to a woman. . . . [Y]ou can use all the facilities of this complete beauty as frequently as you like."

Included in the stipulated exhibits is the training manual for Shape Spa employees. It contains this introductory statement: "We sell Health, Beauty, Youth, Physical Ability, Social Recognition. Those are the things our customers want. We supply these by giving our customers a mixture of attractive club facilities, concrete programs of exercise, *recreation*, and diet, in which we instruct, supervise, and counsel them." (Emphasis added.) We regard this as a further indication that appellees' studios themselves consider their program to be of a recreational nature. However, by no means do we intend to suggest that our decision is based solely on the presence of the word recreation in the employee's training manual.

The facilities and services provided by the health studios are similar in many respects to the health and exercise activities available at a YMCA. In Smith v. Young Men's Christian Ass'n of Montgomery, 462 F.2d 634 (5th Cir. 1972), this court affirmed a district court finding that the recreational activities of the Montgomery, Alabama YMCA "come under the broad definition of entertainment expounded in *Miller* and espoused in *Daniel*." 462 F.2d at 648. We can see nothing in the operation of the appellee health spas which would lead to a contrary result in this case.

Appellees argue that their purpose is to correct physical deficiencies and promote the physical well-being of their patrons; they maintain that they are not "places of entertainment." While we do not doubt that appellees have properly characterized one of the purposes of their health and exercise program, we are convinced that there are sufficient entertainment and recreational aspects of the programs offered to permit the studios to be termed "place[s] of entertainment." We concluded in United States v. DeRosier, 473 F.2d 749 (5th Cir. 1973), that §2000a(b)(3) does not require that the "entertainment be of a certain variety or that a certain quantum of the establishment's business be derived from the entertainment of its customers." 473 F.2d at 752. Our determination that the health studios are "place[s] of entertainment is not disturbed by the fact that they also have the serious purpose of weight reduction and figure control. Such a dual purpose will not operate to remove them from the coverage of the Civil Rights Act.

For the foregoing reasons, we hold the studios to be "place[s] of entertainment" covered by §2000a(b)(3) of the Civil Rights Act of 1964. The judgment of the district court is reversed and the case is remanded for the entry of an appropriate judgment consistent with this opinion.

Reversed and remanded.

AINSWORTH, Circuit Judge (dissenting):

Though firmly in agreement that 42 U.S.C. §2000a(b)(3) must be liberally construed to accomplish the purposes of the Act, I nevertheless disagree with the extreme interpretation by the majority that the term "place of entertainment" includes the Shape Spa health studios. The majority

has simply failed to accord the term "place of entertainment" its generally accepted meaning as employed in common parlance. Thus the congressional purpose is frustrated for the public accommodations provisions of the Act were not designed to include all establishments. I agree with District Judge Boyle that a Shape Spa health studio is not a "place of entertainment" and attach his well-reasoned opinion (Appendix), which I would affirm, as reflecting my views on the subject.

APPENDIX

BOYLE, District Judge:

Plaintiffs sue Shape Spa asserting violation of and jurisdiction under the Civil Rights Act of 1964.

Cross motions for summary judgment involving the issue of jurisdiction have been filed with a stipulation of facts. Both motions raise the question of whether or not the defendant health studios are "Public Accommodations" within the meaning of Title II of the Civil Rights Act of 1964. 42 U.S.C. §2000a et seq. which provides:

> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

It is evident from the language of hte statute that Title II does not prohibit discrimination in all places, or even in all places of "Public Accommodation." Title II prohibits discrimination *only* in any place of public accommodation

as defined in this section. (Emphasis ours). 42 U.S.C. §2000a. The congressional intention to limit the scope of the application of Title II is clear from the definitive nature of 42 U.S.C. §2000a(b):

> (b) Place of public accommodation. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title [42 USCS §§2000a-2000a-6] if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
>
> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
>
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
>
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
>
> (4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection or (ii) within the premises of which is physically located any such covered establishment, and (b) which holds itself out as serving patrons of such covered establishment.

The record supports the finding that the defendant health clubs do not fall within any of the classifications found in 42 U.S.C. §2000a(b)(1), (2) and (4).[1] Nor are they motion picture houses theaters, concert halls, sports arenas or stadia enumerated in 42 U.S.C. §2000a(b)(3). The only classification into which plaintiffs contend the defendants clubs fall is that of "other place of exhibition or entertainmen." 42 U.S.C. §2000a(b)(3).[2]

Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a et seq., is carefully limited to enterprises having a direct and substantial relationship to the interstate flow of goods and people.[3] The Fifth Circuit has recogniped that the Act was not designed to cover all establishments. Miller v. Amusement Enterprises, 394 F.2d 342 (5th Cir. 1968); United States v. DeRosier, 473 F.2d 749 (5 Cir. 1973). In *DeRosier*, the court went on to say:

> . . . this Court en banc concluded that Section 2000a(b)(3) and (c)(3) must be read "with open minds attuned to the clear and strong purpose of the Act, namely, to secure for all citizens the full enpoyment of facilities *described in the Act* which are open to the general public. That Title II of the Civil Rights Act is to be liberally construed and broadly read we find to be well established." Miller v. Amusement Enterprises, Inc., 5 Cir. 1968, 394 F.2d 342, 349. Thus we read the statute, particularly the term "place of entertainment", as did the Supreme Court in Daniel v. Paul, 1969, 395 U.S. 298, 307—308, 89 S.Ct. 1697, 1702, 23 L.Ed.2d 318, 326, *according to its generally accepted meaning* so as to give full effect to Congress' overriding purpose of eliminating the affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public. (Emphasis ours).

[1] There is no contention by the plaintiffs that the defendant health clubs come under Subsections (1, 2) or (4) or Section 2000a(b). As the defendants point out in memorandum, subsection (1) is obviously inapplicable as no lodging accommodations are provided to transient guests or anyone (paragraph 8 of the stipulation); subsection (2) is not applicable as there are no restaurants, coffee shops, or snack facilities whatsoever (see §8 of stipulation) and subsection (4) is not applicable because there are no covered premises located within the defendant Shape Spa studios and defendant Shape Spa studios are not located within any covered establishment.

[2] See the last sentence of Paragraph II of the complaint.

[3] Except where state action is involved. See §2000a(c) and Heart of Atlanta Hotel. Inc. v. United States, 379 U.S. 241 at 250, 85 S.Ct. 348, 13 L.Ed.2d 258.

The generally accepted meaning of the Act's language—"place of exhibition or entertainment"—does not encompass the defendant clubs.

In enacting the public accommodations section of the 1964 Act, Congress did not intend to regulate all establishments that it had the power to regulate. Broad coverage of retail establishments was originally contemplated, H.R. 7152, but that coverage was deleted when the House Judiciary Committee reported the bill. H.R. No. 914 on H.R. 7152, 88th Congress, 1st Session, Part I at 2-3. Congress intended to limit coverage to "those business establishments which on the basis of current experience have proven to be the most important sources of discrimination and, therefore, the focal point of most discriminations." House Judiciary Committee Hearings on H.R. 7152, Part IV at 2555-56 (statement of Attorney General Kennedy).

The concept of generally accepted meaning should not be employer to override what has been judicially established as the intent of Congress, by expanding the scope of a congressionally-limited meaning. Immediately following the language in *Miller* regarding interpretation of Title II of the 1964 Civil Rights Act, the following language appears:

> Though we give to the Act a liberal interpretation, we are aware that the Act was not designed to cover all establishments. "Congress * * * exclude[d] some establishments from the Act either for reasons of policy or because it believed its powers to regulate and protect interstate commerce did not extend so far." Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 273, 85 S.Ct. 348, 366, 13 L.Ed.2d 258, 277 (1964).

The stipulation of the parties establishes that there are no amusement or entertainment facilities such as juke boxes or record players (see §8); and no restaurant or "snack" facilities, shows, performances, or athletic competitions. An insight into the actual operation, object and purpose of defendant health clubs may be gleaned from the training program of Shape Spa's employees. We quote from the Shape Spa Training Program:[4]

> We sell Health, Beauty, Youth, Physical Ability, Social Recognition. Those are the things our customers want. We supply these by giving our customers a mixture of attractive club facilities, *concrete programs of exercise, recreation, and diet*, in which we instruct, supervise, and counsel them.
>
> B. What Does A Technician Do?
>
> C. Service to Members
>
> 1. After a member has printed her name on the sign in sheet, stored her belongings and reported to the gymnasia area, she is to be conducted through her program.

[4] Exhibit "A", pages 6 and 7.

> 2. Pull members chart, change programs where needed—for the benefit of the member (increase or even decrease if necessary).
>
> 3. Be sure program is marked with the correct repetitions for the day. Date the program each day member attends club.
>
> 4. Carry member's chart with you so you know exactly what she is doing.
>
> 5. Stress to the member the importance of following the program as outlined.
>
> 6. Be interested in the member and use her *name* frequently.
>
> 7. *Encourage correct exercise form.*
>
> 8. Encourage *dieting* and following *their diet program.*
>
> 9. *Weigh member each week on same day* and *hopefully* at the same time. Award success sticker for *weekly weight loss goal* if it is achieved.
>
> 10. Be sure to call attention to their *improvements.*
>
> 11. Avoid negative comments to the member.
>
> 12. After member has completed program in gymnasia area—instruct member to change clothing (in dressing booths) and continue instruction in wet area phase of program.
>
> 13. After completion of member's entire program,

refile program and encourage member to return for next *treatment.*

14. Be professional. (Emphasis ours).

The use and purpose of the gymnasium is evidenced by the following statement in the defendants' training manual:

> The gymnasia area with exercise equipment and electrical equipment is designed to help the members of our club *lose weight, gain weight, or reproportion body dimensions as well as to provide general conditioning for the body.* Each exercise offers a particular benefit to the member. (Emphasis ours).
>
> Studio equipment such as:
>
> *Item*
>
> 1. Hips Away
> 2. Bicycle
> 3. Waist Cincher Unit
> a. Rack
> b. Bent Leg Board
> c. Straight Leg Board
> 4. Beauty Bell Unit, consisting
> a. Rack
> b. 3# Pair Beauty Bells
> c. 5# Pair Beauty Bells
> d. 8# Pair Beauty Bells
> e. 10# Pair Beauty Bells
> f. 12# Pair Beauty Bells
> 5 Incline Bench
> 6. Flat Bench

> 7. Beauty Bars
> 8. Swiss Facial Unit
> 9. Treadmills
> 10. Hip & Leg Beautifier
> 11. Leg Kick Machine
> 12. Double Twistaway
> 13. Butterfly
> 14. Contour Mould Unit, consisting of
> a. Board
> b. Weight Jacket
> 15. Low Roller
> 16. High Roller
> 17. Chair Roller
> 18. Vibrator Belt
> 19. Swivelator
> 20. Health Step
> 21. Scale
> 22. Inhalator
> 23. Plate Weights

is provided to accomplish weight loss or gain, apportionment of body dimensions and general conditioning of its users' bodies.

We recognize that there are some elements of fun, relaxation and entertainment derived from many phases of man's daily activities and could well be experienced by some individuals in some of the exercise regimen and

programs offered by the defendant clubs. On the other hand, we doubt that the rigors of the exercise and other activities in which overweight and unshapely female patrons of the clubs must participate to achieve their desired goals and the ultimate benefits offered by the clubs' programs can can be regarded as entertainment of a nature which would cause the clubs to be brought within the Act's coverage. Surely, one who executes the exercises and performs the activities required by the program and upon completion of the course has achieved the maximum benefits possible for that individual may derive great personal satisfaction and joy, and, looking back describe the experience as fun. But those who do not accomplish as much likely would experience disappointment and frustration and condemn the whole affair as an ordeal.

The prime purpose of the clubs and its members is the very serious one of improving physical well-being and any resultant entertainment flowing from use of the clubs' facilities and execution of their programs would be nominal and on an individual, and not public, basis.

We are aware that in United States v. DeRosier, *supra*, the court held that defendant's Northwood Bar was a "place of entertainment" and therefore a "place of public accommodation" under the 1964 Civil Rights Act because of the presence of three coin operated devices which provided the defendants with 3%of the gross revenue of the bar. That court did not consider the three coin operated machines to be insignificant.[5] But we note that a bar, by

[5] But see the dissent of Judge Godbold at 757 regarding the application of a *de minimus principal* and page 758(f) where Judge Godbold summarized his views and stated: "If the particular devices are not part of the normal appurtenances of a bar, and if we are to measure departure from the norm by the presence of mechanical amusement devices, the departure in this instance is too nominal to impose coverage."

its very nature, provides its patrons with such pleasant diversions as drinking various beverages, watching television, visiting with friends and playing cards and other games. Most bars, when taken in their entirety, provide amusement and diversion for their patrons. Also, by their own nature, the following establishments provide amusement and diversion when taken in their entirety and fit into the category of a "place of exhibition or entertainment":

1. An amusement park—Miller v. Amusement Enterprises, Inc., *supra.*

2. A roller skating rink—Evans v. Seaman, 452 F.2d 749 (5 Cir. 1972).

3. Swimming and dancing complex—United States v. Johnson Lake, Inc., 312 F.Supp. 1376 (S.D.Ala. 1970).

4. The educational, spiritual and recreational programs of the Y.M.C.A. Smith v. YMCA of Montgomery, 462 F.2d 634 (5 Cir. 1972).

5. Swimming, boating, picnicking, sunbathing and dancing facilities and a miniature golf course—Daniel v. Paul, *supra.*

[6] Plaintiffs, in their reply memorandum, contend that *Smith* stands for the proposition that a gymnasium is a place of amusement or diversion. It should be noted that the basis for decision in *Smith* was that the YMCA, not its gymnasium, was a "public accommodation" because it presented numerous recreational activities open to the general public (which is not the case for Shape Spa. which had as members only police). The Montgomery YMCA, which was supported by state action and acted under "color of law", freely admitted without question all who applied. 462 F.2d at 648. Such is not the case here.

Defendant Shape Spas do not belong in such category[7]

Accordingly, the defendants' motion for summary judgment should be, and the same is hereby, granted and the plaintiffs' motion for partial summary judgment is hereby denied.

March 5th, 1974.

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[7] Since we have concluded that defendant health clubs are not "places of entertainment", we need not consider whether the defendant clubs "serve the public" and affect commerce". However, it does appear from the record that defendant health clubs are "simply businesses operated for a profit with none of the attributes of self-government and member ownership traditionally associatd with private clubs." See Daniel v. Paul, *supra*, 395 U.S. at 301, 89 S.Ct. at 1699. It is important here that we point out that there is a question whether or not the defendant health clubs serve the general public. Exhibit "D", which is the membership contract, requires the prospective member to disclose a substantial amount of credit information. Members must also be physically sound and have medical approval to proceed with a normal routine of exercises. It therefore appears from the record that defendant health clubs do not serve the public generally, but instead, they only serve those members of the public who have good credit, are physically sound, and have medical approval to exercise. See Gardner v. Vic Tanny Compton, Inc. (1960), 182 Cal.App.2d 506, 6 Cal.Rptr. 490, 87 A.L.R.2d 113, holding that an operation similar to defendant health clubs was not a place of public amusement or accommodation under the California civil rights law.

At least 90% of the gym equipment was manufactured outside Louisiana and "moved" in interstate commerce. Defendant clubs are used by 9,000-12,000 members per year, some of whom are members of out of state health clubs to whom defendant clubs are made available on a reciprocal basis. Defendants also advertise on television and in New Orleans' newspapers, media which cross state lines. These facts would support a finding, if we were required to make such a finding which we are not, that the defendant health clubs affect commerce.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-908

SHAPE SPA FOR HEALTH AND BEAUTY, INC., ET AL.,
Petitioners,

VS.

LINDA ROUSSEVE, ET AL.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ARGUMENT

There is no special or important reason why certiorari should be granted in this case. There is no conflict among the circuits on the Public Accomodations Act coverage issue

decided by the Court of Appeals. Nor does the decision on what is an "other place of . . . entertainment" under the Act conflict with applicable decisions of this Court.

Rather, the basic issue of coverage has already been passed on by the Court in Daniel v Paul, 395 U.S. 298 (1969). The decision by the Court of Appeals represents no more than a case by case process of fleshing out the meaning of 42 U.S.C. § 2000a (b)(3), begun by the Fifth Circuit prior to Daniel v Paul in Miller v Amusement Enterprises, Inc, 394 F. 2d 342 (5th Cir. 1968), and continuing with Smith v YMCA of Montgomery, 462 F.2d 634 (5th Cir. 1972) and United States v De Rosier, 473 F.2d 749 (5th Cir. 1973).

The health studios in question are used by nine to twelve thousand persons a year.

Petitioners actively solicit from the community at large, using modern media to portray their studios as relaxing, recreational and enjoyable places to pass time. They are businesses, geared towards profit, and oiled by providing what the customers want--including "concrete programs of . . .recreation."

These huge operations are hardly the personal service businesses--like barbershops and beauty salons--which Congress exempted from coverage. Nor are their programs designed as therapeutic regimens dedicated to serving physicians in medically prescribed diet control or health care. And petitioner does not suggest otherwise.

Rather, the pitch is that exercise for figure control is work, therefore not pleasure, therefore not

done in a "place of entertainment." The sophristry is apparent to any person who embarks on even a disciplined regime of physical exercise. The weightlifter, while not dismissing the hard work, would hardly deny that his activity is recreational and pleasurable, and the gymnasium a place of recreation and entertainment. The swimmer, while aware of the tedium of laps, would hardly deny that his activity is recreational and pleasurable, and the pool a place of recreation and entertainment.

And petitioners do not contend that members must, on pain of ouster, religiously follow any figure control regime designed for them by the staff. The casual use of the facilities is available

(probably dominant), and is as literally relaxing or recreational as casual weightlifting or swimming.

In a very fundamental sense, petitioners' self-proclaimed and advertised image of themselves as luxurious, relaxing watering-holes or spas for ladies, should estop their protestations against coverage. When petitioners solicit indiscriminately by telephone exchange, and then refuse the woman at the other end of the line if she is black; when petitioners offer trial sessions to all women, and turn away a woman at the door if she is black; when petitioners design their television and newspaper advertisements to appeal to all women's needs, conceits or fantasies, but do not produce for a black woman's needs, a black woman's conceits or a black woman's

fantasies; then petitioners are designedly humiliating black women in places publicly represented to accomodate all women. Congress intended the Public Accomodations Act to end such humiliation. The decision of the Court of Appeals does no more than implement the Congressional purpose in holding petitioners' establishments to be covered by the Act.

CONCLUSION

The Petition for Certiorari offers no special or important reason why this Court should review a clearly correct decision of the Court of Appeals. Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have, on this ____day of March 1976 served three copies of the foregoing opposition on all interested counsel by depositing same in the mail with first class postage prepaid, addressed as follows:

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